IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36001

STATE OF IDAHO,	)	**2010 Unpublished Opinion No. 411**
	)	
Plaintiff-Respondent,	)	**Filed: March 30, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JERAD D. JONES,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge.

Order of the district court denying motion to suppress, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Jerad D. Jones appeals from the trial court's denial of his motion to suppress. We affirm.

I.

PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to a probation agreement, probation officers Shrum and Beamer arrived at the apartment of a probationer to conduct a search. The probation officers asked Jones, who answered the door, if the probationer was there, stating that they were conducting a probation search. Jones stated that the probationer was not there and did not object to the search. Upon entering, they smelled marijuana and observed burnt "joints" in an ashtray on the living room floor. A police officer was called to assist but did not arrive for about twenty-five minutes. Shrum asked Jones to sit on the couch and he monitored him as Beamer conducted a search of the apartment. Beamer found a potato made into a pipe, a sandwich bag of marijuana, and a set of scales.

Prior to the police officer's arrival, Shrum picked up a cell phone from an ottoman within two to three feet of Jones. Knowing that the cell phone belonged to Jones, Shrum searched through the cell phone for fifteen to twenty minutes and wrote down text messages from the phone. Shrum placed the cell phone back on the ottoman prior to the police officer's arrival.

Officer Speer arrived to supervise Jones as the probation officers continued to search the apartment. Speer testified he smelled marijuana when he entered the apartment, but had no reason to detain Jones when he first arrived. Speer observed the cell phone on the ottoman but did not pick it up. Speer was shown the contraband discovered by Beamer, and Speer asked Jones if the items belonged to him. Jones admitted to possession of the items. Jones was then arrested inside the apartment, handcuffed, and placed in the patrol car. A canine unit was called to conduct a search of the apartment.

After the canine search, Speer seized a potato pipe, a sandwich bag of marijuana, and a scale. Speer did not directly pick up the cell phone. Shrum seized the cell phone after the canine unit conducted its search, which Shrum testified was one to two minutes after the arrest of Jones. Shrum gave the cell phone to Speer and showed Speer some of the relevant text messages.

Jones moved to suppress his statements admitting possession of the contraband and the evidence from the cell phone. After a hearing, the trial court denied the motion to suppress holding that Jones was not in custody at the time the statements were made and that the seizure of the cell phone was lawful as a search incident to a lawful arrest. Jones pled guilty to possession of marijuana with intent to deliver, a felony, in violation of I.C. § 37-2732(a)(1)(B) and reserved his right to appeal the denial of the motion to suppress. Jones was sentenced to a unified four-year term with two years determinate. The court suspended the sentence and placed Jones on probation for two years. Jones appeals.

II.

ANALYSIS

Jones appeals the denial of the motion to suppress his statements to the police prior to his arrest and the evidence police obtained from searching his cell phone. The Supreme Court has stated the standard of review:

> In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated. *State v. Watts*, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005). This Court will accept the trial court's findings of fact unless they are clearly erroneous. *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). However, this Court may freely review the trial court's application of constitutional principles in light of the facts found. *Id.*

State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009).

Although a warrantless entry or search of a residence is generally illegal and violative of the Fourth Amendment, such an entry or search may be rendered reasonable by an individual's consent. *State v. Johnson*, 110 Idaho 516, 522, 716 P.2d 1288, 1294 (1986); *State v. Abeyta*, 131 Idaho 704, 707, 963 P.2d 387, 390 (Ct. App. 1998). In such instances, the State has the burden of demonstrating consent by a preponderance of the evidence. *State v. Kilby*, 130 Idaho 747, 749, 947 P.2d 420, 422 (Ct. App. 1997). "[A] probationer's consent to searches constitutes a waiver of Fourth Amendment rights." *State v. Purdum*, 147 Idaho 206, 208, 207 P.3d 182, 184 (2009).

The determination of whether an investigative detention is reasonable requires a dual inquiry--whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct. App. 2004); *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct. App. 2000). An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003). Such a detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct. App. 2002). Where a person is detained, the scope of detention must be carefully tailored to its underlying justification. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *Parkinson*, 135 Idaho at 361, 17 P.3d at 305. In this regard, we must focus on the intensity of the detention, as well as its duration. *Roe*, 140 Idaho at 181, 90 P.3d at 931. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *Parkinson*, 135 Idaho at 361, 17 P.3d at 305. Brief inquiries not otherwise related to the initial purpose of the stop do not

necessarily violate a detainee's Fourth Amendment rights. *Roe*, 140 Idaho at 181, 90 P.3d at 931.

In this case, the probation and police officers entered the probationer's apartment with the probationer's consent pursuant to his probation agreement. Jones answered the door and did not object to the search. Additionally, the marijuana and other contraband that was found provided articulable facts that justified suspicion that Jones had engaged in criminal conduct, and temporarily detaining Jones during the remainder of the search was justified. In appealing the denial of the motion to suppress, Jones only argues that (1) his statements to the officer should be suppressed because he was in custody when the officer questioned him, and (2) the evidence from the cell phone should be suppressed because it was outside his immediate control when he was arrested.

A. Jones's Statement to the Police

Jones contends that his answers prior to his formal arrest should be suppressed because he was in custody and was not given *Miranda*[1] warnings. The courts will suppress statements given during custodial interrogations when officers fail to administer *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). In *State v. James*, ___ Idaho ___, ___ P.3d ___ (Jan. 27, 2010), the Supreme Court recently addressed when a person is in custody stating:

> The U.S. Supreme Court's decision in *Miranda* requires that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. at 471. *Miranda* warnings are required where a suspect is "in custody," a fact determined by "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)). To determine whether custody has attached, "a court must examine all of the circumstances surrounding the interrogation." *Stansbury v. California*, 511 U.S. 318, 322 (1994). The test is an objective one and "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).[2]

---

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Specifically, the Court in *Berkemer* stated this principle to emphasize that a "policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *Berkemer*, 468 U.S. at 442.

James, ___ Idaho at ___, ___ P.3d at ___.

"[A] court considering whether an individual is in custody 'must consider all of the circumstances surrounding the interrogation.'" *Id*. (quoting *State v. Doe*, 137 Idaho 519, 523, 50 P.3d 1014, 1018 (2002)). It is the defendant's burden to show that he is in custody. *Id.* at ___, ___ P.3d at ___. Relevant factors include: the duration of the detention; the number of questions; the visibility of the interrogation; whether the defendant was informed the detention would be for an extended period of time; and whether physical restraint is used. *Id*. at ___, ___ P.3d at ___.

The *James* Court applied this analysis to a traffic stop on I-84 where the officer removed three occupants from the car and, after getting consent to search, found a pipe and methamphetamines in the car. *Id.* at ___, ___ P.3d at ___. The officer did not know who the drugs belonged to and threatened to arrest all three occupants if no one took responsibility. James then admitted to possessing the contraband. He argued that the officer's threat of arrest put him in custody. However, the Court ruled that the officer's "statement of his intended future conduct cannot be said to objectively change the degree of restraint *at the time of the statement*." *Id*. at__, ___ P.3d at __ (emphasis in original). The *James* Court focused on the restraint of the defendant and whether it rose to a level associated with formal arrest rather than any fear of future arrest.

In this case, probation officer Shrum testified she arrived with another probation officer to search the probationer's apartment. Shrum testified she asked Jones to sit on the couch during the search but did not physically restrain Jones or give him other orders. Officer Speer testified that he responded to the apartment as security for the probation officers and when he arrived Jones was already seated in the living room. Speer testified Jones was not handcuffed, no weapons were out, no orders were given to Jones to stay where he was, Jones never asked to leave, and there was only one other police officer around but not necessarily during questioning. Speer estimated the time from when he arrived to when Jones was arrested as 30 to 45 minutes, but Jones was not questioned during this entire time. Speer testified that as the probation officers found paraphernalia Jones was questioned about his ownership interest in the items and Jones provided incriminating answers.

The trial court correctly determined the questions to be interrogative, but made the following findings with regard to whether Jones was in custody:

> As I pointed out, no guns were drawn nor were there any coercive or threatening tactics utilized. The timeframe was between 20 and 45 minutes that transpired prior to the formal arrest. The time was taken up by a combination of things such as idle chit-chat and the officers conducting searches through the course of the apartment and communicating inquiries about the contraband with the defendant.
>
> Certainly, there was an air of restraint when the young man was in this apartment and police officers and probation officers are present, but I don't think that's sufficient to lend a custodial setting for the purposes of Miranda.

The court also found the officers did not use coercive interrogation tactics or show of force. The court then found Jones was not in custody at the time of the interrogation at issue.

Jones's freedom of movement was not restrained to the same degree as that associated with a formal arrest. While there were four officers of the State present at times in the apartment, only one was supervising Jones as the others searched the apartment. Jones was not handcuffed or told he could not leave. The officers allowed Jones to stand at times or sit either on the couch or on the floor. Further, the record supports the trial court's finding that coercive interrogation tactics were not used. Jones has failed in his burden of showing he was in custody.

B. Search of Jones's Cell Phone

Jones claims that the officer's search and seizure of his cell phone was unconstitutional and evidence therefrom should be suppressed. A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999). A lawful custodial arrest is a well-delineated exception that justifies a search without a warrant of the person arrested and the area within his immediate control. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *State v. Moore*, 129 Idaho 776, 781, 932 P.2d 899, 904 (Ct. App. 1996). The permissible scope and purpose of this exception is to remove any weapons the arrestee might have and prevent the concealment or destruction of evidence. *Chimel*, 395 U.S. at 762-63; *Moore*, 129 Idaho at 781, 932 P.2d at 904. The area within his immediate control is that "from within which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763. "Immediate control is determined based on the objective facts of each case." *State v. LaMay*, 140 Idaho 835, 838, 103 P.3d 448, 451 (2004). The factors for determining the area of immediate control are:

> (1) the distance between the arrestee and the place searched; (2) whether the arrestee was handcuffed or otherwise restrained; (3) whether police were

> positioned so as to block the arrestee from the area searched; (4) the ease of access to the area itself; and (5) the number of officers present as compared to the number of companions of the arrestee.

LaMay, 140 Idaho at 838, 103 P.3d at 451 (quoting *State v. Bowman*, 134 Idaho 176, 179-180, 997 P.2d 637, 640-41 (Ct. App. 2000)); *see also United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996) (proposing a similar list of factors to consider in determining the area of immediate control).

The timing of the search must be "about the same time as the arrest." *Hudson*, 100 F.3d at 1419. A search may be conducted shortly after the arrestee is removed from the area as long as: (1) the search is limited to that area that was in the immediate control of the arrestee at the time of the arrest, and (2) events after the arrest and before the search do not make the search unreasonable. *Id*. Requiring officers to collect weapons and evidence at the same instant the arrest is made would be "entirely at odds with safe and sensible police procedures." *United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) (quoting *United States v. Fleming*, 677 F.2d 602, 607 (7th Cir. 1982)). An officer can constitutionally search an item within an arrestee's immediate control at the instant of arrest; there is no additional constitutional infringement for an officer to secure the arrestee and then promptly collect the evidence.

Before Jones was arrested, the probation officer picked up Jones's phone, knowing it was Jones's, and searched through some messages.[3] At the suppression hearing, Officer Speer testified that at the time of arrest the cell phone was sitting on the ottoman in the center of the living room two to three feet from Jones. Speer testified that he arrested Jones for possession of paraphernalia after Jones acknowledged that some of the contraband found belonged to him. Probation officer Shrum testified that she picked the cell phone up from the ottoman, knowing it was Jones's cell phone, a minute or two after Jones was arrested. She then gave the cell phone to Speer and showed him some of the text messages. Shrum also testified she regularly searches the text messages on cell phones for: "Nudity, pornography, drug exchanges, contacts with other people that are on probation." She also testified that a person can quickly delete all the text messages by hitting a few buttons.

---

[3] Jones has not challenged the legality of this initial search and we, therefore, express no opinion thereon.

The trial court held:

> The reality is is [sic] that the seizure of the cell phone was justified under a search incident to a lawful arrest.
>
> I've already concluded that when the law enforcement came to the premises, the apartment, they were certainly entitled to do so. They knocked on the door, which they were entitled to do so. Mr. Jones opened the door. Upon opening the door, the law enforcement officers detected the odor of marijuana. At that point, they certainly had the right under the probation consent to enter in to [the probationer's] residence. They also at that point had sufficient probable cause to believe at a very minimum that Mr. Jones was at least frequenting a place where controlled substances were present, and, therefore, the ultimate arrest of Mr. Jones would be lawful.
>
> Obviously, his comments that had been made in the course of the search would further support the officers arresting Mr. Jones. Once he was arrested, within this immediate vicinity was a telephone. That telephone was in sufficient proximity to Mr. Jones and was contemporaneous to the arrest of Mr. Jones that the search incident to arrest exception of the search warrant would clearly apply under Chimel vs. California. And so a search incident to arrest would allow law enforcement to, in fact, search and seize the cell phone that was within the immediate presence of Mr. Jones.

Jones claims that the cell phone was not within his immediate control when he was arrested. He argues the cell phone was outside his reach because he was two to three feet from the phone and after the arrest he was handcuffed and taken outside. Jones states: "considering that he was placed in handcuffs and taken outside, it is clear that he was in no position to reach the telephone upon his arrest." He asserts that destruction of evidence could not be a concern because the search was not contemporaneous to the arrest and the cell phone was examined after the arrest when Jones was taken to the patrol car.

The record shows that the arrest was legal, the cell phone was sitting within two to three feet of Jones, and Jones was not restrained until arrest. The trial court's finding that the cell phone was within Jones's immediate control at the time of the arrest is supported by substantial and competent evidence. The officers could constitutionally seize the cell phone at the time of the arrest. Seizing and searching the cell phone immediately after securing Jones did not render the search unreasonable. The trial court correctly denied the motion to suppress evidence from the cell phone.

III.

CONCLUSION

Jones was not in custody when the incriminating statements were made and was, thus, not entitled to prior *Miranda* warnings. Search and seizure of the cell phone was constitutional as a search incident to a lawful arrest. Therefore, the trial court's denial of Jones's motion to suppress is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**